INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	10

CITATIONS

Cases:	
Delaney v. *United States*, 263 U. S. 586	10
Gunning v. *Cooley*, 281 U. S. 90, 94	9
School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94	8
Statute:	
Criminal Code, sec. 215 (18 U. S. C. sec. 338)	2

411308—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 502

ARTHUR T. LELLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 648–651) is reported in 120 F. (2d) 447.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1941 (R. 652). A petition for rehearing was denied July 21, 1941 (R. 653). The petition for a writ of certiorari was filed August 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was evidence warranting the submission to the jury of the question of petitioner's guilt.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Criminal Code, sec. 215; 18 U. S. C., sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted (R. 52–53) upon seven counts of an indictment in eight counts (R. 2–35),[1]

[1] The seventh count was withdrawn from the jury's consideration (R. 407, 595).

each charging the mailing of a different letter in execution of a scheme to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, in violation of 18 U. S. C., sec. 338.[2] Petitioner was sentenced to concurrent terms of three years' imprisonment on six counts (R. 55–58) and ordered placed upon probation for five years on the remaining count, probation to commence upon expiration of the three-year sentences (R. 58).

The case proved under the indictment may briefly be summarized as follows:

The scheme involved arose out of a mail-order business owned and operated by petitioner (R. 84–85, 408). Petitioner sold supplies, equipment, and instructions purportedly designed to enable purchasers profitably to grow mushrooms in such places as cellars, sheds, or other similar available space (Exs. 89, 100).[3] Having commenced business late in 1937 (R. 290, 413), petitioner had sold to over 5,000 customers by the time the indictment was returned in December 1939 (R. 35, 292). Petitioner advertised in 149 newspapers and in 27 magazines and periodicals at a monthly cost of about $1,000. He received from 75 to 100 replies per day, made sales to about 18 per cent of those

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[2] The principal fraudulent representations are indicated in the summary of evidence, *infra*, pp. 4–7.

[3] These and other exhibits referred to are on file with this Court.

replying, and apparently netted about $3,000 per month (R. 292). Mushroom spawn costing him about forty cents (R. 287) he sold for $4.90 (Ex. 100, p. 21). "Amco," a prepared fertilizer, costing him about four cents (R. 287), he sold for fifty-five cents (Ex. 100, p. 23).

Prospective customers were furnished with a booklet of sales literature entitled "Money in Growing Mushrooms at Home—Grow Them for Pleasure and Profit—They Pay" (R. 76; Ex. 100), in which the prospective customer was advised to "rush" his order, since petitioner's offer was "limited." Prospects who came to petitioner's place of business and requested that they be shown some mushrooms growing were informed that that was impossible because of the trouble which it would cause to petitioner's growers (R. 77).

In sales literature and advertisements prospects were informed that petitioner would purchase all mushrooms grown by them at thirty cents a pound or better (Ex. 66; 100, pp. 25, 30); that "Washington Mushroom Industries" (petitioner's trade name) was the "largest of its kind in the world"; that it was established in 1931 (Ex. 100, p. 6); that by using "Amco" fertilizer, "an amazing scientific new discovery", guesswork was eliminated (Ex. 100, p. 7). In support of his claim that mushrooms always commanded a high price, petitioner gave certain figures indicating that the demand for mushrooms was more than thirty-two times the available supply (Ex. 100, p. 8).

Petitioner placed emphasis upon the ease with which anyone could grow mushrooms (Ex. 100, pp. 8–12), "the practical certainty of success and the attractive profit possibility"; for example, "$30.00 weekly or more earned" (Ex. 17). Petitioner, however, knew of no one who had made $30 a week (R. 293, 469). In emphasizing the profit possibility, petitioner quoted the language from a text by William Falconer, an "eminent authority on mushroom growing" (Ex. 100, pp. 15–16). In these excerpts it was stated that the home growing of mushrooms was just as easy as the growing of flowers or any other plant, and that the secrets of mushroom growing were closely guarded, a fact explained as follows (Ex. 100, p. 16):

> "All this secrecy means just this," continues Mr. Falconer. "There is a FORTUNE in MUSHROOMS. I can assure you that there is no secret at all in growing them. Mushrooms bring fancy prices and the supply is never anything like equal to the demand. It is a poor bed that will not give four or five pounds of mushrooms per day. On a small bed you should get at least five quarts daily after the bed commences to bear."

Falconer was an authority on mushroom growing around 1890 to 1900 (R. 323, 342) and prices at that time were extremely high—$1.00 to $1.50 per pound, as against recent prices ranging from fourteen to thirty-five cents per pound (R. 323, 342, 403–404). The mushroom industry, it was shown,

has changed since Falconer's time in such a way that methods profitable then would be entirely unprofitable and unsuccessful now (R. 342, 343).

Persons sending in orders were sent a book of instructions, mushroom spawn, and an ordinary ten-cent thermometer for testing mushroom beds (R. 79). They were also urged to order at the same time "Amco," a prepared fertilizer devised to take the place of horse manure in mushroom growing and claimed by petitioner to have been his own invention (R. 79, 287, 413, 417; Ex. 100, pp. 5, 7, 10, 18, 20, 23, 24, 26 34). Petitioner's materials were wholly unsuitable for successful mushroom growing (R. 317, 326, 329, 330). Samples of spawn sold by petitioner were pronounced by expert witnesses for the Government to be worthless (R. 323, 360, 361) or not to be spawn at all (R. 314, 315, 324, 335, 341, 360). The "Amco" was drastically deficient in essential contents as a fertilizer (R. 317, 318, 322, 328). Prepared fertilizer of the "Amco" type had been the subject of research in the mushroom industry for many years but only partial success had been attained (R. 312, 313, 319). Petitioner had had no appreciable experience in the growing of mushrooms or in the preparation of mushroom spawn (R. 286–287, 464–466).[4]

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[4] Some of the spawn petitioner sold was purchased by him from other firms (R. 413–419), while some he made himself (R. 419).

There was evidence from which the jury could find that the profitable growing of mushrooms under the best conditions and with the best materials and equipment was an extremely difficult and complicated business, requiring experience and the closest attention to details (R. 315–318, 362). Dr. E. B. Lambert, a plant pathologist in charge of a Government mushroom project (R. 303), testified that "A mushroom crop is one of the most difficult to grow. There is no agricultural crop that is as complicated" (R. 316). A yield of two pounds to a square foot each planting was not, as claimed by petitioner (Ex. 100, p. 17), a normal crop, but an abnormal one even for commercial growers (R. 316).

For the Government some one hundred purchasers of petitioner's materials and instructions testified that they were wholly unsuccessful in growing mushrooms, many of them having failed to grow a single mushroom (see *e. g.,* R. 90, 99, 109, 127, 176, 180). Numerous complaints were made to petitioner but he continued business on the same basis (R. 99, 109, 136, 164, 209, 233, 234, 236, 241). Some fifty witneses testified on petitioner's behalf that they had grown mushrooms (R. 485, *et seq.*). While, according to Government witnesses, mushrooms might, under certain conditions, be grown by using petitioner's materials and following his instructions, the possibility of growing a satisfactory or profitable crop was exceedingly remote (R. 315, 317–318, 319, 330).

ARGUMENT

1. Petitioner contends that the affirmance by the circuit court of appeals of the overruling by the trial court of his motion for a directed verdict is inconsistent with this Court's decision in *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; that the jury was permitted to decide between that group of witnesses whose opinion of petitioner's business was unfavorable and that group whose opinion was favorable (Pet. 13–15).

The *McAnnulty* case is not comparable. There it was held that the Postmaster General was powerless to issue a fraud order based upon his determination that mental healing was not efficacious, since that was not determinable by proof but rested merely upon opinion. Here the issues presented are simply whether petitioner's representations that mushrooms could be easily and profitably grown by anyone who followed his instructions and used his materials were false and whether he knew them to be false.[5] These issues were entirely susceptible of proof.

2. Petitioner also contends that at most he was guilty of permissible "puffing" in his advertising literature and that, his business being legitimate, he should not be condemned because some of his customers were dissatisfied (Pet. 16–22).

[5] Indeed, so far as appears from the record, these were the dominant issues presented below (see R. 600, 609, 611–619, 622–623, 650–651). There is nothing to indicate that any reliance was placed upon the *McAnnulty* decision.

We submit that the trial judge in passing upon petitioner's motion for a directed verdict was entitled to draw a different inference from the evidence.[6] Petitioner's advertising and sales literature was patently designed to create the false impression that mushrooms could, with petitioner's supplies and under his instructions, be easily and profitably grown by anyone without appreciable risk of failure; that success and profit were virtually inevitable, although petitioner knew of many and repeated failures, with resultant loss of investment as well as profit. Supplemented by other misrepresentations and claims designed to instill confidence, such as that petitioner's business was the largest of its kind in the world, that it was organized in 1931, and that his instructions were "the most up-to-date, latest, and complete, simplified, step-by-step instructions" for the beginner in growing mushrooms (Ex. 100, p. 7), there can, we submit, be no doubt that there was enough evidence to go to the jury on the issue as to whether petitioner was knowingly conducting a fraudulent enterprise. Indeed, as was said by the circuit court of appeals, "the case presents a typical device of attracting the savings of little people by representing as certain and easy that which is speculative and difficult. If believed by the jury, there was ample evidence to support the thesis of

[6] The trial court was, of course, required to view the evidence in the light most favorable to the Government. *Gunning* v. *Cooley*, 281 U. S. 90, 94.

the indictment, namely, that the business carried on by [petitioner] and promoted through the use of the mails was not a legitimate or good faith enterprise, but was in essence an unconscionable racket, known by appellant to be such" (R. 651).

The case was submitted to the jury under most comprehensive instructions upon the pertinent issues (R. 594, 625) and, in view of the concurrence of that body, the trial judge and the circuit court of appeals in their estimate of the evidence, it would seem that petitioner has made no such showing as would require a further review of the evidence by this Court. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

The cases relied upon by petitioner (Pet. 16–22) turn upon their own facts and are not analagous to the present case.

CONCLUSION

There exists no conflict of decisions and there is involved no question of public importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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